WAN NOOR KAMARIAH WAN JAAFAR v. ARITAH REALTY SDN BHD & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
HADHARIAH SYED ISMAIL JCA
AHMAD NASFY YASIN JCA
[CIVIL APPEAL NOS: W-01(NCVC)(W)-654-11-2018, W-02(NCVC)(W)-2322-11-2018, W-02(NCVC)(W)-2325-11-2018, W-02(NCVC)(W)-2347-11-2018 & W-02(NCVC)(W)-2348-11-2018]
24 JUNE 2021

LAND LAW: *Transfer – Validity – Individual parcels of building sold to purchasers – Developer failed to apply for strata title for individual unit – Residential units and shop lots still under master title – Discovery that master title of building transferred to another company – Allegations that sale and transfer of building tainted with fraud and illegality – Whether particulars of fraud and illegality pleaded – Whether allegations of fraud and illegality made out*

LAND LAW: *Transfer – Title – Indefeasibility – Individual parcels of building sold to purchasers – Developer failed to apply for strata title for individual unit – Residential units and shop lots still under master title – Discovery that master title of building transferred to another company – Whether land owner bare trustee – Whether seized with legal capacity to pass any title or interest – Whether title passed – Whether registration of title valid and indefeasible – National Land Code, s. 340(2)(b)*

LAND LAW: *Transfer – Bona fide purchaser – Individual parcels of building sold to purchasers – Developer failed to apply for strata title for individual unit – Residential units and shop lots still under master title – Discovery that master title of building transferred to another company and charged to bank – Whether bank subsequent acquirer of title – Whether bona fide purchaser – Whether bank enjoyed indefeasible title – National Land Code, s. 340(3)*

In 1981, Aritah Realty Sdn Bhd ('AR') erected a building ('Wisma Aritah'), on a piece of land that it owned, which comprised 40 units of individual parcels which were sold to the appellants. However, the developer failed to apply for strata title for the individual unit; the residential units and shop lots were still under a master title despite already being sold. In 2016, the appellants discovered that Munir & Sons (M) Sdn Bhd ('MS') executed a writ of distress over the entire units in Wisma Aritah to recover outstanding rental in the sum of RM840,000 allegedly owned by AR to MS. The appellants were also instructed to vacate their unit lots. A land search conducted by AR revealed that the master title had been transferred by AR to MS in 2014 and subsequently charged to Small Medium Enterprise Development Bank

Malaysia Berhad ('SME Bank'). AR commenced a suit at the High Court and argued that the sale and transfer of Wisma Aritah was a fraudulent transaction, illegal and void ('Suit 55'). However, mid-trial, AR withdrew Suit 55 and the same was struck out. To protect their interest in the unit lots, the appellants filed Suits 44, 56 and 82 against AR and MS, on the ground that the sale and transfer of Wisma Aritah to MS was tainted with fraud and illegality. To enforce its right as an absolute assignee in the sale and purchase agreement ('SPA') involving three appellants ('three assignors'), CIMB brought Suit 456 against AR, MS and SME Bank on the ground that the transaction between AR and MS and the charge in favour of SME Bank shall not be indefeasible where the registration was obtained by means of an insufficient or void instruments. The Judicial Commissioner ('JC') dismissed all the appellants' claims against AR, MS and SME Bank and allowed in part CIMB's claim. The JC was of the opinion that, *inter alia*: (i) with the discontinuance of Suit 55, the allegations of fraud and illegality in the sale of Wisma Aritah were also discontinued. The fraud or illegality pleaded in Suit 55 were not the pleaded cases of the appellants and the particulars of fraud were not pleaded by the appellants; (ii) the unit purchasers could not be regarded as the beneficial owner of Wisma Aritah as they did not contract to buy Wisma Aritah or the land upon which it sat. What the purchasers contracted for were the ownership of units in Wisma Aritah and the ownership of such units may only be achieved when the title *ie*, strata title were issued to them; and (iii) the concept of bare trustee and the acquisition of beneficial interest could only arise if there existed a registrable interest capable of transfer. Hence, the present appeals. The issues that arose for adjudication were whether the JC (i) failed to consider the legal principle of bare trustee and the acquisition of beneficial interest; and (ii) erred in his ruling that the issues of fraud and illegality in the sale of Wisma Aritah were discontinued with the discontinuation of Suit 55.

Held (allowing appeals; setting aside decision of High Court)
Per Hadhariah Syed Ismail JCA delivering the judgment of the court:

(1) The principle of beneficial ownership applied to the appellants after they executed the SPA and paid the full purchase price to AR. This was an equitable principle aimed to protect innocent purchasers, like the appellants, who had fulfilled their obligations under the contract. As the beneficial owners, the appellants enjoyed the benefits of being the owner of the units even though they have yet to become the registered owner. On the other hand, AR, as the vendor became a bare trustee under the principle of constructive trust. As a bare trustee, AR had no beneficial interest over the unit lots purchased by the appellants. Without any interest whatsoever in the unit lots of the appellants, AR could not and was not permitted in law to sell or transfer the entire Wisma Aritah based on the principle of *nemo dat quod non habet* (no one gives who possess not). (paras 25-28)

(2) The JC erred in law and in fact when he ruled that (i) with the discontinuance of Suit 55, the allegations of fraud and illegality in the sale of Wisma Aritah were also discontinued; (ii) the fraud or illegality pleaded in Suit 55 were not the pleaded cases of the appellants; and (iii) the particulars of fraud were not pleaded by the appellants. The particulars of fraud pleaded in Suit 55 were also the particulars of fraud pleaded by AR in its statement of defence to Suits 44, 56 and 82. Fraud was also pleaded by the appellants in Suits 44, 56 and 82. It was clear that fraud and illegality were the pleaded cases of the appellants and AR and was a live issue to be decided by the court despite the withdrawal of Suit 55. Based on pleadings and evidence, illegality was also brought to the notice of the JC but he failed to consider the parties' pleaded issues and evidence on fraud and illegality. (paras 30, 33, 34 & 36)

(3) Since the contract was illegal and AR was a bare trustee with no legal capacity to pass any title or interest, no title was passed to MS. The registration of title into MS's name was defective under s. 340(2)(b) of the National Land Code ('NLC') and must be set aside. MS's contention that they obtained an indefeasible title was misconceived. (para 40)

(4) SME Bank contended that they were a subsequent acquirer of title and a *bona fide* purchaser, having an indefeasible title and relying on the proviso to s. 340(3) of the NLC. However, the registrations of transfer and chargers took place concurrently *ie*, at the same date and time. Therefore, SME Bank was an immediate holder of the charge and not a subsequent holder. As an immediate purchaser, SME Bank could claim protection under the proviso to s. 340(3) of the NLC. (para 41)

Case(s) referred to:

Bank Pertanian Malaysia Bhd v. Nora'rifah Darus [2014] 7 CLJ 631 CA ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly known as Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

RHB Bank Bhd v. Travelsight (M) Sdn Bhd & Ors And Another Appeal [2015] 1 CLJ 309 FC ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***

Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***

Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd [2011] 1 LNS 1853 CA ***(refd)***

Legislation referred to:
National Land Code, s. 340(2)(b), (3)

For the appellants - Suhaimi Kamarudin & Muhamad Khalil; M/s Syamsir Nasrul Khalil & Shahidan
For the CIMB - KY Sim, Mohd Khairi Tarmizi & Tan Chin Seng; M/s KY Sim & Co
For the Aritah Realty - Ahmad Fakhri, Azlan Abd Ro'ni & Nasyrah Ezzan Ali; M/s Roni & Co
For the Munir & Sons - Lancelot Rozario & Vijay Edward; M/s Lancelot Rozario
For the SME Bank - Aedyla Bokari; M/s Nassir Hafiz Nazri & Rahim

[Editor's note: For the High Court judgment, please see Wan Noor Kamariah Wan Jaafar v. Aritah Realty Sdn Bhd & Ors And Other Cases [2018] 1 LNS 1641 (overruled).]

Reported by Najib Tamby

JUDGMENT

Hadhariah Syed Ismail JCA:

Introduction

[1] These five appeals are concerned with competing ownership claims over a few units of residential and shop lots (unit lots) erected on 4½ storey building known as Wisma Aritah held under the master title GRN No. 76881, Lot 1404 Seksyen 41 (previously held under QTR 753, Lot 1404), Bandar Kampung Bharu, Kuala Lumpur (Wisma Aritah). Aritah Realty Sdn Bhd is the registered proprietor of Wisma Aritah. In the early 1980s to 1990s, Aritah Realty sold the unit lots to the appellants (plaintiffs). Sometimes in 2016, the appellants discovered that Aritah Realty had sold and transferred the entire Wisma Aritah including the unit lots purchased by the appellants to Munir & Sons (M) Sdn Bhd. The master title of the land on which Wisma Aritah stood was currently registered in the name of Munir & Sons (M) Sdn Bhd and charged to Small Medium Enterprise Development Bank Malaysia Berhad as security for the loan granted to Munir & Sons (M) Sdn Bhd.

[2] Aritah Realty contended the sale of Wisma Aritah to Munir & Sons was without any lawful authority and the result of fraud committed by one of the directors of Aritah Realty named Zahar bin Ariffin (deceased); company secretary of Aritah Realty named Nurul Farahin binti Md Ambia; and an individual who has no connection whatsoever with Aritah Realty named Norazam bin Tazli.

[3] Aritah Realty then commenced Suit No.WA-21 NCVC-55-05-2017 (Suit 55) at the Kuala Lumpur High Court. The plaintiffs in Suit 55 are Abdul Munir bin Ariffin and Aritah Realty. The defendants are: the representative of Zahar bin Ariffin (deceased) as the first defendant; Nurul Farahin binti Md Ambia as the second defendant; Munir & Sons as the third defendant; Pengarah Tanah dan Galian Kuala Lumpur as the fourth defendant; and Mass

A Rapid Transit Corporation Sdn Bhd as the fifth defendant. The fourth and fifth defendants were removed as parties before the trial. In Suit 55, Aritah Realty maintained its position that the sale and transfer of Wisma Aritah was a fraudulent transaction, illegal and void.

B **[4]** However, in mid-trial, Aritah Realty withdrew Suit 55. On 6 July 2018, the court struck out Suit 55 without liberty to file afresh.

[5] To protect their interest in the unit lots, the individual appellants filed Suit 44, Suit 56 and Suit 82 against Aritah Realty and Munir & Sons. CIMB intervened in Suit 44 as the fourth defendant. CIMB filed a counter-claim
C against its three assignors (Azmillah binti Rosman, Azmin Kass bin Rosman and Melati Perspektif Sdn Bhd) for similar reliefs in Suit 456. The appellants' pleaded case in Suit 44, Suit 56 and Suit 82 was the sale and transfer of Wisma Aritah to Munir & Sons is tainted with fraud and illegality as Aritah Realty knew the unit lots had already been sold to the appellants. *Vide* these
D suits, the appellants sought for *inter alia* a declaratory relief that they are the beneficial owners of the unit lots and that the sale and transfer of Wisma Aritah to Munir & Sons be declared null, void *ab initio* and illegal.

[6] Likewise, to enforce its right as an absolute assignee in the sale and purchase agreement involving appellants named Azmillah binti Rosman,
E Azmin Kass bin Rosman and Melati Perspektif Sdn Bhd (the assignors), CIMB brought Suit 456 against these three appellants, Aritah Realty, Munir & Sons and Small Medium Enterprise Development Bank Berhad. CIMB's pleaded case was the transaction between Aritah Realty and Munir & Sons and the charge in favour of SME Bank shall not be indefeasible where the
F registration was obtained by means of an insufficient or void instrument. CIMB claims for various declaratory orders. Among the reliefs sought is a declaratory order that CIMB is the absolute assignee for the three assignors; that the three assignors are the beneficial owners of the unit lots and a declaration that the sale and transfer of Wisma Aritah is illegal and void.

G **[7]** On 18 October 2018, the learned Judicial Commissioner (now JCA) dismissed all the appellants' claims against Aritah Realty, Munir & Sons Sdn Bhd and Small Medium Enterprise Development Bank Malaysia Berhad with no order as to costs. The learned JC only allowed in part CIMB's claim namely for a declaratory order that CIMB is the absolute assignee for
H Azmillah binti Rosman; Azmin Kass bin Rosman and Melati Perspektif Sdn Bhd and that the loan agreement and deed of assignment is valid and enforceable.

[8] For ease of reference, in this judgment we shall refer the parties as follows:

I (i) The appellants as the appellants or CIMB interchangeably whenever appropriate;

(ii) Aritah Realty Sdn Bhd as Aritah Realty;

(iii) Munir & Sons (M) Sdn Bhd as Munir & Sons; and

(iv) Small Medium Enterprise Development Bank Malaysia Berhad as SME bank.

Background Facts

[9] Sometimes in 1981, Aritah Realty as the land owner held under the master title together with a developer known as Pembangunan Bukit Kuda (M) Sdn Bhd erected a four and half (4½) storey building known as Wisma Aritah comprising of 40 units of individual parcels namely eight units of shop lots, eight units office lots and 24 units of flat lots with common facilities.

[10] Almost all the individual appellants took a loan from various banks to finance the purchase of their unit lot. Some of them purchased directly from Aritah Realty. Some bought their unit through public auction. Since these purchase happens in the early 1990s, more than 20 years ago, most of the purchasers have fully settled the purchase price.

[11] However, the developer, Pembangunan Bukit Kuda (M) Sdn Bhd failed to apply for strata title for the individual unit. Even though all the residential units and shop lots have been sold, all the units are still under a Master Title. Pembangunan Bukit Kuda (M) Sdn Bhd was wound up.

[12] On 10 June 2016, the appellants had a rude shock when Munir & Sons executed a writ of distress over the entire units in Wisma Aritah purportedly to recover outstanding rental in the sum of RM840,000 allegedly owed by Aritah Realty to Munir & Sons. The appellants were instructed to vacate their unit lots on 15 June 2016.

[13] Aritah Realty then conducted a land search and the search showed that the master title had been transferred by Aritah Realty to Munir & Sons on 2 July 2014. The master title was subsequently charged to SME Bank on 2 July 2014.

[14] In June 2016, Aritah Realty was informed that the land is being acquired by Mass Rapid Transit Corporation Sdn Bhd through a Government *Gazette* dated 7 April 2016 for the purpose of developing a light rail transit project through the land and that owners of the land will be compensated.

[15] Due to the ownership dispute, the award of compensation has been deposited in court.

[16] Aritah Realty's defence was that the sale and transfer of Wisma Aritah to Munir & Sons was tainted with fraud and/or effected without lawful authority.

[17] Munir & Sons' defence to all the suits can be summarised as follows. They had conducted a land search which shows Aritah Realty is the registered owner and the land was unencumbered. They also conducted a physical search at Wisma Aritah and found the building was tenanted. They proceeded to sign a sale and purchase agreement dated 20 September 2013 with Aritah Realty to purchase Wisma Aritah at the agreed price of RM11 million. After the purchase of Wisma Aritah, it was rented to Aritah Realty for a rental of RM70,000 per month. A tenancy agreement dated 26 August 2014 was allegedly signed between Aritah Realty and Munir & Sons. Thus, Munir & Sons took the position that it was a *bona fide* purchaser for value having purchased it for a total consideration of RM11 million. Munir & Sons contended that its purchase of Wisma Aritah was without notice of any fraudulent conduct or lack of authority and the title it obtained from Aritah Realty was indefeasible by reason of s. 340 of the National Land Code.

[18] SME Bank's defence was that its dealing with Munir & Sons was done carefully by taking the following steps: depositing the original title of the property with SME Bank's lawyer; conducting a land search which shows the land is unencumbered and obtaining a confirmation from Aritah Realty that it had not entered into any agreement to sell the property with any third party. Thus, SME Bank contended it had acted *bona fide* for valuable consideration.

The High Court Judgment

[19] Based on the grounds of judgment, the learned Judicial Commissioner (JC) has decided as follows:

(i) with the discontinuance of Suit 55, the allegation of fraud and illegality in the sale of Wisma Aritah were also discontinued;

(ii) without the issuance of strata titles, the unit purchasers shall only have the rights of ex contract which is in the form of chose in action;

(iii) without an assignment of rights and benefits in the contract with Aritah Realty and the developer, the rights to the benefit of Aritah Realty's and the developer's obligation thereunder would not be passed down to the unit purchasers. Hence, there cannot exist any rights to any existing property. All that exists, without the strata title being issued, are rights in contract;

(iv) the unit purchasers cannot be regarded as beneficial owners of Wisma Aritah. They did not contract to buy Wisma Aritah or the land upon which it sits. What the purchasers contracted for were ownership of units in Wisma Aritah and ownership of such units may only be achieved when title ie strata title were issued to them. Having regard to the decision of *Tan Ong Ban*, that without any title to the units purchased, the plaintiffs have no registrable interest under the National Land Code;

(v) the concept of bare trustee and the acquisition of beneficial interest can only arise if there is in existence a registrable interest capable of transfer; and

(vi) the unit purchasers could have terminated their respective sale and purchase agreement with Aritah Realty and the developer (either as assignee or original contracting parties) for their breach in not applying for and securing strata title.

Grounds Of Appeal

[20] The appellants raised two main grounds of appeal as follows:

(i) The learned JC had failed to consider the legal principle of bare trustee and the acquisition of beneficial interest.

(ii) The learned JC had erred in his ruling that the issue of fraud and illegality in the sale of Wisma Aritah were discontinued with the discontinuation of Suit 55.

Our Decision

[21] It is settled law that an appellate court can intervene with the finding of facts by a trial judge when the findings are grounded entirely on speculations, surmises or conjecture; when an inference made by a trial court from its factual findings is plainly wrong, absurd or illogical; where there is none or insufficient judicial appreciation of evidence; when the findings of a trial court run contrary to the admission of the parties to the case, or fail to notice certain relevant facts which if properly considered, will justify a different conclusion; when the findings of facts are premised on the absence of evidence, or are contradicted by the evidence on record (see *Bank Pertanian Malaysia Bhd v. Nora'rifah Darus* [2014] 7 CLJ 631; [2014] 6 MLJ 870).

[22] Reverting to the present case. The facts revealed Aritah Realty never disputed it had sold the unit lots to the appellants. Aritah Realty also did not dispute they have executed the deed of assignment in favour of CIMB. Aritah Realty also never raised the issues that these appellants have not paid the full purchase price for the said lot units. Nevertheless, CIMB confirmed its borrowers have fully settled the purchase price to Aritah Realty. Based on the facts, Aritah Realty must be deemed to have knowledge of the appellants' ownership over the lot units in dispute in these cases.

[23] Based on the above, CIMB and the appellants submitted they were the beneficial owners of the lot units and Aritah Realty hold those lot units as trustee on behalf of the appellants and CIMB. However, the learned JC held the concept of bare trustee and acquisition of beneficial interest does not apply because the appellants do not have a strata title. The learned JC also

held the appellants' sole remedy is to sue the vendor under the terms in the sale and purchase agreement. The appellants submitted the learned JC had erred in law and in fact in failing to consider the principle of bare trustee and acquisition of beneficial interest as decided in *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad (Formerly known as Time Engineering Sdn Bhd)* [1996] 2 CLJ 561; [1996] 2 MLJ 12 where the Federal Court held:

> The contractual events which result in the vendor becoming a bare trustee of the land for the purchaser, is on completion of the sale and purchase agreement, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

[24] In *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; [2016] 3 MLJ 23, the Federal Court held:

> The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

[25] We agree with the appellants' submission. The principle of beneficial ownership applies to the appellants after they have executed the sale and purchase agreement and paid the full purchase price to Aritah Realty. This is an equitable principle aimed to protect innocent purchasers like the appellants who had fulfilled their obligations under the contract. As the beneficial owners, the appellants enjoy the benefits of being the owner of the units even though they have yet to become the registered owner.

[26] On the other hand, Aritah Realty as the vendor becomes a bare trustee under the principle of constructive trust. In *RHB Bank Bhd v. Travelsight (M) Sdn Bhd & Ors And Another Appeal* [2015] 1 CLJ 309; [2016] 1 MLJ 175, the Federal Court held:

> A constructive trust arises whenever the circumstances are such that it would be unconscionable of the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another ...

[27] As a bare trustee, Aritah Realty had no beneficial interest over the unit lots purchased by the appellants. At this juncture, it is instructive to refer to the case of *Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors* [1974] 1 LNS 175*;* [1974] 2 MLJ 45, where the Federal Court held:

> the vendors having parted with their interest in the lands to the appellants were bare trustees and had no interest in the land over which a valid caveat could be lodged.

[28] Without having any interest whatsoever in the lot units of the appellants, Aritah Realty could not and is not permitted in law to sell or transfer the entire Wisma Aritah based on the principle of "*nemo dat quod non habet*" (no one gives who possess not). In *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 Federal Court held:

> The Court of Appeal was right in finding that MPM, after having entered in the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare trustee and as such was not permitted to deal with the lots. We are in agreement with the Court of Appeal that the subsequent sales, transfers or conveyances of the lots by MPM to the new purchasers (including the appellant) were void *ab initio*, as MPM did not have any legal or requisite capacity to enter into such agreements.

[29] The facts in these appeals is similar to *Samuel Naik*'s case. Therefore, by way of analogy, the appellants rightly submitted before us that the sale and transfer of Wisma Aritah from Aritah Realty to Munir & Sons is void *ab initio* as Aritah Realty had no legal capacity to enter into such transactions.

[30] With regard to the issue of fraud and illegality in the sale transactions, the appellants submitted that the learned JC had erred in law and in fact when he ruled: (a) with the discontinuance of Suit 55, the allegation of fraud and illegality in the sale of Wisma Aritah were also discontinued; (b) the fraud or illegality pleaded in Suit 55 were not the pleaded case of the appellants; and (c) the particulars of fraud were not pleaded by the appellants. We agree with the appellants. Our reasons are as follows:

(a) After perusing the appeal records, we find the particulars of fraud pleaded in Suit 55 were also the same as the particulars of fraud pleaded by Aritah Realty in its statement of defence to Suits 44, 56 and 82. This fact is admitted by the learned JC in para. 66 of his judgment.

(b) The particulars of fraud pleaded by Aritah Realty in paras. 13 and 40 of its defence reads as follows:

> 13. Justeru itu, defendan pertama menegaskan dengan kukuh disini bahawa, perbuatan-perbuatan defendan kedua tersebut adalah satu perbuatan yang salah, berniat serong, bertentangan dengan hak ketuanpunyaan, satu perbuatan menipu dan memperdayakan bukan sahaja defendan pertama, malah pemilik-pemilik unit yang telah dibeli oleh orang ramai atas pengataan-pengataan bahawa:
>
> (a) Pindahmilik hartanah tersebut kepada defendan kedua telah dilakukan secara frod, konspirasi dan kini ketuanpunyaan adalah disangkal dan dicabar.

(b) Instrumen pindahmilik iaitu borang 14A yang dimajukan kepada Pejabat Tanah dan Galian, Kuala Lumpur adalah cacat, batal dan tidak sah atas alasan-alasan berikut:

(i) Menurut rekod defendan pertama, tidak pernah sebarang resolusi syarikat ada dan pernah diluluskan untuk penjualan hartanah tersebut;

(ii) Menurut rekod defendan pertama, tidak pernah sebarang resolusi syarikat ada diluluskan memberi kuasa atau otoriti kepada mana-mana pihak untuk menandatangani sebarang instrument Pejabat Tanah bagi pihak defendan pertama;

(iii) Menurut rekod defendan pertama juga, tidak pernah wujud sebarang perjanjian jualbeli yang sahih menjurus kepada penjualan hartanah tersebut;

(iv) Borang pindahmilik tanah tersebut telah ditandatangan dan terdapat meteri syarikat defendan pertama yang telah digunakan tanpa kelulusan dan digunakan dengan niat menipu dan frod; dan

(v) Tiada sebarang balasan bernilai pernah wujud diberikan oleh defendan kedua kepada pemilik sebenar iaitu defendan pertama.

(c) Sebuah bangunan komersil yang didirikan di atas hartanah milik defendan pertama telah dijual lot-lot kediaman dan lot-lot kedai kepada pembeli- pembeli.

(d) Bangunan Wisma Aritah tersebut bukanlah milik defendan kedua, bahkan ianya milik pembeli-pembeli dan sebahagiannya dimiliki juga oleh defendan pertama.

40. Defendan pertama menegaskan bahawa ia tidak pernah meluluskan resolusi-resolusi tersebut dan tidak pernah bersetuju untuk menjual hartanah tersebut kepada mana-mana pihak berdasarkan pengataan-pengataan di bawah:

(a) Salah seorang pengarah defendan pertama iaitu Abdul Munir bin Ariffin tidak pernah menandatangani resolusi-resolusi tersebut dan tiada sebarang pengetahuan mengenai kewujudan resolusi-resolusi tersebut sehinggalah pihak defendan kedua mengeksibitkan resolusi- resolusi tersebut dalam Affidavit Jawapan defendan kedua bertarikh 7.6.2017;

(b) Aritah Realty Sdn Bhd Shareholders' Circular Resolution telah ditandatangani oleh Norazam bin Tazli yang pada masa material adalah bukan pemegang saham, pengarah mahupun diberi kuasa oleh defendan pertama dan/atau Lembaga Pengarah defendan pertama untuk mewakili defendan pertama; dan

(c) Nurul Farahin binti Md Ambia telah menurunkan tandatangan dan cop salinan diakui sah pada resolusi-resolusi tersebut walaupun resolusi-resolusi tersebut tidak pernah diakui, diluluskan mahupun dipersetujui dan merupakan satu penghasilan dokumen palsu dan berbentuk frod.

[31] Under Suit 456, Aritah Realty had filed and issued a third party notice against the third party namely Zahar bin Ariffin, Nurul Farahin binti Md Ambia and Norazam bin Tazli where Aritah Realty alleged that Aritah Realty was the victim with the act of fraud, cheating and deceiving done by Munir & Sons and third party.

[32] The third party failed to enter appearance against the third party notice issued by Aritah Realty and failed to appear before the High Court to defend themselves.

[33] Fraud were also pleaded by the appellants in Suit 44, Suit 56 and Suit 82. Even though it is true that the fraud pleaded by the appellants is not similar to the fraud alleged by Aritah Realty and not particularised, in our view this difference does not mean the "fraud" pleaded by the appellants carried no weight or no meaning at all. The appellants' case is simply this. Despite Aritah Realty knew the appellants were the beneficial owners of the unit lots and common sense dictate that Aritah Realty cannot sell the same unit lots for the second time (after the lapse of 20 years), yet Aritah Realty sold Wisma Aritah to Munir & Sons. To aggravate matters, the sale was carried out without the appellants' knowledge. So, this is the "fraud" meant by the appellants. Therefore, it is impossible for the appellants to give particulars of fraud. The appellants can only plead facts which they have personal knowledge. On the other hand, Aritah Realty who claims the instruments to effect the sale were a forgery had to give the particulars so that the court and all the parties had a clear picture and understanding. It is our considered view that as a result of the learned JC's failure to appreciate the evidence, he had come to a wrong conclusion.

[34] Based on the above, it is clear as day follows night that fraud and illegality were the pleaded case of the appellants and Aritah Realty and is a live issue to be decided by the court despite the withdrawal of Suit 55. We, therefore find the learned JC had erred in his ruling that fraud and illegality is no longer an issue.

[35] At the trial, one of Aritah Realty's directors, En Abdul Munir bin Ariffin testified that:

(i) There is no sale and purchase agreement between Aritah Realty and Munir & Sons as there is no resolution from the board of directors of Aritah Realty approving the sale.

(ii) The transfer form (Form 14A) was signed by Zahar bin Ariffin and Nurul Farahin binti Md Ambia and Aritah Realty's company seal was used without authorisation.

(iii) There was no valuable consideration ever given by Munir & Sons to Aritah Realty.

(iv) There was no company resolution approving any power of attorney authorising any party to give out signature on any instrument of land office on behalf of Aritah Realty.

(v) Aritah Realty never applied for a new land title for Lot 1404. Instead, the new land title was applied for and obtained by Norazam bin Tazli, who is not a shareholder or director in Aritah Realty.

(vi) He lodged a police report soon after he discovered the fraud.

[36] Based on the pleadings and the evidence, we had no doubt in our mind that illegality was brought to the notice of the learned JC. However, we find the learned JC had failed to consider the parties pleaded issues and the evidence on fraud and illegality. Had he done so, he would have come to a different conclusion that is the sale to Munir & Sons is an illegal contract and a fraudulent transaction. That the transfer to Munir & Sons was effected by means of void or insufficient instruments. That on the balance of probabilities, fraud and illegality have been proven. It is a fundamental rule of law that a court will not enforce an illegal contract. In *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21, the Federal Court said:

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

[37] However, in its submission before the High Court and before us, Aritah Realty had taken a different position as to what they have pleaded in its defence particularly in paras. 55 and 56 of Aritah Realty's written submission where it was submitted that Aritah Realty had acknowledged receipt of a deposit sum of RM1,100,000 and a further sum of RM1,900,000 from Munir & Sons. In *Zulpadli Muhammad & Ors v. Bank Pertanian Malaysia Bhd* [2011] 1 LNS 1853; [2013] 2 MLJ 915, the court held:

> The respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit show that the appellants were innocent victims as much as the respondent was. The respondent is estopped from taking a position different from that pleaded in its defence in the earlier suit.

[38] We trust learned counsel for Aritah Realty are well aware of the fundamental rule of law that parties are bound by their pleadings. We therefore hold Aritah Realty is estopped from taking a different position from their pleaded defence.

[39] In a case where fraud and illegality have been made out, the next issue for us to consider is whether Munir & Sons had obtained an indefeasible title under s. 340 of the National Land Code (NLC) which provides as follows:

340. Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[40] Since we have found that the contract is illegal and Aritah Realty is a bare trustee who had no legal capacity to pass any title or interest, it therefore follows that no title is passed to Munir & Sons. The registration of title into Munir & Sons' name was defective under s. 340(2)(b) NLC and must be set aside. Munir & Sons' contention that they had obtained an indefeasible title is misconceived.

[41] We now deal with SME Bank's charges. SME Bank contended they are a subsequent acquirer of title and a *bona fide* purchaser. They claimed to have an indefeasible title and rely on the proviso to s. 340(3) NLC. Therefore, SME Bank submitted the charges must remain. We disagree. It is an undisputed fact that the registration of transfer and the registration of the charges took place concurrently on 2 July 2014, time 2:52:47pm. Therefore, we find SME Bank is an immediate holder of the charge and not a subsequent holder. As an immediate purchaser, SME Bank cannot claim protection under the proviso to s. 340(3) NLC. We refer to the case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987, where the Federal Court held:

> Whenever a registered title or interest is sought to be set aside under s. 340 of the NLC, trial courts should first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If it is the former, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility and his title is liable to be set aside if any of the vitiating elements set out in s. 340(2) of the NLC has been made out. If it is the latter, those vitiating elements would not affect the title or interest, provided the title or interest is acquired by the subsequent purchaser in good faith and for valuable consideration.

[42] Based on *Kamarulzaman*'s case, SME Bank's charges will have to be set aside.

[43] For the aforesaid reasons, we find there is merit in the appeals. We were satisfied that there was insufficient judicial appreciation of the pleadings by the learned JC that warrant this court's intervention. We therefore allowed the appeals. We set aside the decision of the learned JC and substituted therewith with judgment entered for the appellants in Suit 44, Suit 56, Suit 82 and Suit 456. We also ordered each respondent to pay cost of RM30,000 to the appellants.